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**In the Supreme Court of the United States**

OCTOBER TERM, 1977

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**No. 77-1364**

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CENTRAL ARKANSAS AUCTION SALE, INC.; MAJOR  
LEWIS, D/B/A MAJOR LEWIS LIVESTOCK AUCTION  
SALES; BILL RICE AND LOIS RICE, D/B/A CLEBURNE  
COUNTY LIVESTOCK AUCTION SALE; AND TRAVIS  
McGEE, D/B/A ATKINS LIVESTOCK AUCTION,

*Petitioners,*

vs.

THE U. S. DEPARTMENT OF AGRICULTURE AND  
THE PACKERS AND STOCKYARDS—AMS,

*Respondents.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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**REPLY MEMORANDUM IN SUPPORT  
OF THE PETITION**

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The Packers and Stockyards—AMS and the United States Department of Agriculture state, at pages 3 and 4 of their Memorandum In Opposition (in No. 1366—*Giles Lowery Stockyards, Inc. v. U. S. Department of Agriculture*, a companion case to this):

“Petitioner seeks to distinguish these cases on the ground that the Department had adopted and applied the ratemaking principles approved in the instant case as early as 1970 (Pet. 12-16). Thus, petitioner asserts,

the principles were not adopted in either rulemaking or adjudication. But although a number of the theories that the Department formally adopted (for the first time) in this case had been applied on an informal case-by-case basis in previous years, that does not make their formal adoption less appropriate or valid. They escaped authoritative announcement only because, until the present case, none had been challenged in a contested action. . . ."

"It must follow that the Department was not obliged to publish its ratemaking procedures prior to the decision of the judicial officer, and that the procedures used here did not violate the FOIA. Procedures cannot be published before they have been adopted; when procedures are adopted in adjudication, the agency's opinion always will be the first formal publication. . . ."

By way of reply to Respondents' Memorandum In Opposition in general, and to the above-quoted material, in particular, Petitioners' Central Arkansas Auction Sale, Inc., et al. make the following points:

1. When Agency witness Jack W. Brinckmeyer, Chief of the Rates, Services and Facilities Branch of the Packers and Stockyards—AMS, states, for example, with respect to the computed allowance for the use of land, A109, "We adopted that approximately (in 1968) . . .", the simple and specific question is: "Why wasn't it announced to those affected so that they could have a chance to govern their businesses accordingly?" While the Respondents try to divert the Court's attention with a characterization that the Agency's use of its rate analysis methodology was "informally . . . applied", the testimony of Mr. Brinckmeyer, quoted so often in both the Decision of the Ju-

dicial Officer and in the Initial Decision of the Administrative Law Judge is definitely that the Agency did in fact *adopt* and *apply* its rate analysis methodology to those regulated without providing the regulated marketing businesses the opportunity to operate in accordance with the Agency's adopted policy.

2. This Court stated in *N.L.R.B. v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 94 S.Ct. 1757, 40 L.Ed.2d 134 (1974) at 293, 294 (1971):

And in *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759, 89 S.Ct. 1426, 22 L.Ed.2d 709 (1969), the Court upheld a Board order enforcing an election list requirement first promulgated in an earlier adjudicative proceeding in *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236 (1966). The plurality opinion of Mr. Justice Fortas, joined by the Chief Justice, Mr. Justice Stewart, and Mr. Justice White, recognized that "adjudicated cases may and do . . . serve as vehicles for the formulation of agency policies, which are applied and announced therein," and that such cases "generally provide a guide to action that the agency may be expected to take in future cases." *N.L.R.B. v. Wyman-Gordon Co.*, *supra*, at 765-766, 89 S.Ct. at 1429.

A review of the three leading authorities, *S.E.C. v. Chenery Corp.*, 332 U.S. 194, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947); *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759, 89 S.Ct. 1426, 22 L.Ed.2d 709 (1969); and *N.L.R.B. v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 94 S.Ct. 1757, 40 L.Ed.2d 134 (1974), on the choice of ad hoc litigation vs. rulemaking cannot be squared with the Agency having a key witness (Mr. Jack W. Brinckmeyer), mount the witness stand and under oath in a full hearing in April, 1976, begin to testify about policy (rate analysis

methodology) adopted as far back as 1968—eight (8) years previously; but never announced to those affected by such policy. And this was done again and again. Hence, the rate analysis methodology was not “applied and announced” in the administrative hearing below. Rather, it was adopted and applied by the Agency in years prior to the hearing below; but, without giving knowledge of its adoption, application, and interpretation to those regulated. This underscores the extreme importance of Question 1 to the field of administrative law.

3. In summary, as opposed to the concept of the Agency’s rate analysis methodology being derived from an adjudicatory hearing, either in 1974 or 1976, the rate analysis and corresponding dates of implementation are outlined as follows:

- A. Obtain Actual Expenses Of The Marketing Business.
- B. Obtain Adjusted Expenses By Removing:
  - 1. Expenses irrelevant to market’s consignors of livestock.
  - 2. Owners’ compensation and salary.
  - 3. Bad debt losses.
  - 4. Business getting and maintaining expenses.
- C. Add Allowances For:
  - \* 1. Compensation for working owners (1970) (A101-A106);

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\*Note: The “removals” of Part B are later replaced with “allowances” in Part C, and the marked allowances are based on a computation involving the animal unit concept, with 1969 being the earliest firm date referenced in either the Initial Decision and Order of the Administrative Law Judge, see Appendix “C” beginning at A138, and the Decision and Order of the Judicial Officer, Appendix “B”, beginning at A13, see especially A163.

- \* 2. Owners’ management (1970) (A101-A106);
- \* 3. Interest on working capital;
- \* 4. Business getting and maintaining expenses (A164);
- 5. Return on buildings and equipment (1969);
- \* 6. Use of land (1969) (A119-A120 & A166);
- 7. Bad debts (1968) (A109);
- \* 8. Operating margin (A128).
- D. Obtain Reasonable Revenue Requirement (B+C).
- E. Compare Actual Revenue Of The Marketing Business To The Reasonable Revenue Requirement.

4. These four Petitioners concluded their petition as follows:

“Without notice of either the substantive policy or its interpretation, the Petitioners have been subject to ‘secret law’.”

At first blush, this may seem a bit dramatic, but consider please the following from the Initial Decision and Order of the Administrative Law Judge, Appendix “C”, A210:

“... In 1974, in light of numerous requests by markets with value-based tariffs to increase their rates and charges, P&SA decided to disallow every request that would continue any form of value-based tariff (T. 69-70, 165). The requests by respondents were principally denied on that basis (T. 223) although their individual revenue requirements have also been analyzed by P&SA leading it to conclude that the new tariffs will generate revenues in excess of those requirements.” (Emphasis added.)

But there is no mention of that "decision by P&SA to disallow every request" being announced to those affected by such a decision. And, again, the Agency's rate analysis is in place and in use.

Hence, Petitioners pray that their Petition For A Writ Of Certiorari be granted.

Respectfully submitted,

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